This Document was reproduced with optical character recognition software,
please refer to an orginal copy in imporatant matters - ME

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREE SPEECH, STEAL THIS RADIO, DJ THOMAS PAINE, DJ CARLOS RISING, DJ SHARIN, DJ E.S.E., FRANK MORALES and JOAN MUSSEY,	
Plaintiffs,	98 Civ.2680 (MBM)
-against	OPINION AND ORDER
JANET RENO, as Attorney General of the United States, UNITED STATES DEPARTMENT OF JUSTICE and FEDERAL COMMUNICATIONS COMMISSION,	
Defendants.	

APPEARANCES:

BARBARA OLSHANSKY, ESQ.
(Attorney for Plaintiffs)
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, N.Y. 10012
(212) 614-6439

ROBERT T. PERRY, ESQ.
(Attorney for Plaintiffs)
509 12th Street, #2C
Brooklyn, N.Y. 11215
(718) 788-1529

MARY JO WHITE, ESQ.
United States Attorney for the
Southern District of New York
BETH E. GOLDMAN, ESQ.
Assistant United States Attorney
(Attorneys for Defendants)
100 Church Street
New York, N.Y. 10007
(212) 637-2732

.

MICHAEL B. MUKASEY, U.S.D.J.

Plaintiffs Free Speech, Steal This Radio, DJ Thomas Paine, DJ Carlos Rising, DJ Sharin, DJ E.S.E., Frank Morales and Joan Mussey challenge the constitutionality of certain provisions of the Federal Communications Act of 1934 (the "Act"), as amended, 47 U.S.C. § 301 et sea:, and regulations of the Federal Communications Commission ("FCC"). Specifically, plaintiffs seek declaratory and injunctive relief with respect to Steal This Radio's unlicensed radio broadcasts. The government counterclaims to enjoin plaintiffs' broadcasts and moves to dismiss plaintiffs' complaint.

For the reasons stated below, the government's motion to dismiss is granted, plaintiffs' request for a preliminary injunction is denied, and the government's request for injunctive relief is granted.

I.

The facts underlying this case are set out partially in an earlier opinion, see Free Speech v. Reno, No. 98 Civ. 2680, 1999 OWL 47310 (S.D.N.Y. Feb. 1, 1999), familiarity with which is assumed for current purposed and the following section repeats facts only to the extent relevant to the present motions.

Plaintiffs DJ Thomas Paine, DJ Carlos Rising, DJ Sharin and DJ E.S.E. either produce or present programming that is broadcast over Steal This Radio, a low-power radio station in New

York City. (Compl. ¶¶ 5-8)1 Although Steal This Radio first began broadcasting in November 1995, no one in affiliation with the station has ever applied for, or obtained, a broadcast license from the FCC. (Id. ¶¶ 64, 69) Plaintiffs allege that any application to the FCC would be futile because the agency does not issue licenses to stations, such as Steal This Radio, that broadcast at less than 100 watts of power. (Id. ¶ 69)

In March 1998, an FCC official named Judah Mansbach visited the building from which Steal This Radio was broadcasting at the time. (Id. ¶ 73) Mansbach notified plaintiffs that the FCC had received a complaint that Steal This Radio's transmission was interfering with the signal of a licensed radio station. (Id.) Plaintiffs allege further that Mansbach stated he would return to seize Steal This Radio's broadcasting equipment if plaintiffs did not immediately stop broadcasting.(Id.)

On March 6, 1998, plaintiffs decided to go off the air. (Td.) Five days later, plaintiffs allege, Mansbach returned to their broadcast site and shut off the building's electricity. (Id. ¶ 80) On April 15, 1998, Steal This Radio resumed broadcasting from a new location and, shortly thereafter, plaintiffs filed this case. (Id.)

In their complaint, plaintiffs raise eight claims, the Majority of which present facial challenges to the constitutionality of the Act and several FCC licensing

---

[1] It "Compl." refers to plaintiffs' first amended complaint dated relay 12, 1998.

regulations. In their first and second claims, plaintiffs contend that § 301 of the Act, which forbids radio broadcasts without a license, is overbroad. (Id. ¶¶ 85, 87) Plaintiffs' third and fourth claims challenge also the breadth of the statute, claiming that §§ 307(a) and 309(a), which permit the FCC to grant licenses when the "public interest, convenience, and necessity would be served," provide the FCC with "unfettered discretion" to make licensing decisions resulting in the "monopol[ization of] speech in the electronic public forum dedicated to radio broadcasting," in violation of plaintiffs' First and Fifth Amendment rights. (Id. ¶¶ 88-91) The fifth claim attacks the authority of the FCC to auction licenses pursuant to § 309(j), claiming that competitive bidding is the functional equivalent of a tax on broadcasting that infringes on protected speech. (Ed. ss 92, 93) In their sixth 2nd seventh claims, plaintiffs contend that the forfeiture statute, § 510, as "applied by defendants to microradio stations," and FCC enforcement policies regarding cease and desist orders, create a system of formal and informal prior restraints and thereby violate the First, Fourth and Fifth Amendments. (Id. ¶¶ 94-97)

Plaintiffs' eighth claim is a statutory claim, not a constitutional one. Plaintiffs contend that the current FCC enforcement policy violates the statutory conditions set forth in s 312(c)-(d) of the Act, (id. ¶¶ 98, 99), because, when the FCC executes cease and desist orders it does not serve violators with an order to show cause at least 30 days before an administrative

hearing where the introduction of evidence and burden of proof are on the FCC. See 47 U.S.C. § 312(c)-(d).

II.

On a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the court should dismiss the complaint if it appears "'beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. "' Northrop v. Hoffman of Simsbury Inc., 134 F.3d 41, 42 (2d Cir. 1997) (quoting Conley v. Gibson, 355 U.S. 41, 4546 (1957)). It is not the court's function to weigh the evidence that right be presented at trial; instead, the court rust merely determine whether the complaint itself is legally sufficient. See Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1905). In doing so, the court rust accept the material facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995). The issue before the court on a Rule 12(b)(6) motion "is not whether a plaintiff is likely to prevail ultimately, 'but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test. "' Id. (quoting Weisrisan v. LeLandais, 532 F.2d 308, 311 (2d Cir. 1976) (per curiam)).

III.

Preliminarily, it seems useful to address this court's jurisdiction over plaintiffs' complaint, see Fed. R. Civ. P. 12(h)(3), and plaintiffs' standing to sue.

A. Jurisdiction

Although the government barely mentions the topic, this court's jurisdiction is severely limited by the Act. Under the doctrine of primary jurisdiction, a party who wishes to challenge an FCC policy or practice must first do so through a motion for a declaratory ruling from the FCC itself. See FCC v. ITT World Communications Inc., 466 U.S. 463, 468 n.5 (1984); United States v. AAny and A11 Radio Station Transmission Equip. Etc., 19 F. Supp. 2d 738, 745 (E.D. Mich. 1998); United States v. Neset, 10 F. Supp. 2d 1113, 1114-15 (D.N.D. 1998). The Act gives the courts of appeals exclusive jurisdiction to review all final FCC decisions or orders. See 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a); see also ITT, 466 U.S. at 468.

However, a district court does have jurisdiction to issue an injunction against a person alleged to be violating the Act when an application is brought by the U.S. Attorney at the request of the FCC. See 47 U.S.C. § 401(a). In addition, a district court has jurisdiction over forfeiture enforcement actions. See 47 U.S.C. § 504(a). Finally, a district court possesses jurisdiction over facial challenges to the constitutionality of the Act, see 28 U.S.C. § 1331, even if the

challenge is to an FCC matter. See Ticor Title Ins. v. FTC, 814 F.2d 731, 843 (D.C. Cir. 1987); Time Warner Entertainment Co. L.P. v. FCC, 810 F. Supp. 1302, 1304 (D.D.C. 1992).

Plaintiffs' first through sixth claims can be broadly read as constitutional challenges to the facial validity of the licensing and forfeiture provisions of the Act and, therefore, are properly before this court. In contrast, plaintiffs' seventh and eighth claims must be dismissed under the doctrine of primary jurisdiction. In both these claims, plaintiffs contend that FCC enforcement policies violate constitutional and statutory requirements. (See Compl. ¶¶ 97, 99) Insofar as these are not challenges to the facial validity of the statute, but rather attacks on FCC policies and practices, this court does not have subject matter jurisdiction.

B. Standing

The government does not contest plaintiffs' standing to bring a facial challenge of the radio broadcast licensing regime. The government does argue, however, that plaintiffs lack standing to challenge § 309(j) (fifth claim) and the remedial provisions of the Act: the FCC's authority to seize equipment pursuant to § 510 (sixth claim) and its authority to issue and enforce a cease and desist order pursuant to § 312 (seventh and eighth claims). Specifically, the government contends that plaintiffs fail to show that they have suffered the "injury-in-fact" that establishes the first element for standing.

Plaintiffs rely on Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1978), to establish standing, claiming they are under the threat of impending injury because an FCC official has warned them that continued broadcasts will lead to forfeiture proceedings. Plaintiffs cite also Steffel v. Thompson, 415 U.S. 452, 459 (1974), to support their argument that a threat of prosecution under a statute that abridges First Amendment rights is sufficient to establish standing. (See Pi. Reply at 36) Moreover, plaintiffs claim to have suffered a wholly independent and sufficient injury to their First Amendment rights because of the statute's "chilling" effect on their conduct. (See id. at 37) 2

It is well established that the "irreducible constitutional minimum of standing contains three elements." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

---

2 Plaintiffs in this case include not only Steal This Radio and those who operate that microradio station, but also two listeners of the microbroadcasts: Frank Morales and Joan Mussey. In general, recipients of information have First Amendment rights which are the reciprocal of the senders' rights. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 747 (1976) ("If there is a right to advertise, there is a reciprocal right to receive the advertising."); see also Board of Educ. v. Pico, 457 U.S. 853, c66 (1982) (explaining that "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them"). These two plaintiffs base their standing on the injury caused by the licensing scheme's interference with their right to receive information. (See Compl. ¶ 79) At this point, the injury alleged by these two plaintiffs is hypothetical; Steal This Radio has resumed its broadcasts. Inasmuch as interruptions or delays in service have occurred, plaintiffs Morales and Mussey's standing may be established concurrently with that of Steal This Radio and its operators. Therefore, I need consider only the standing of the latter group of plaintiffs.

> First, the plaintiff must have suffered an 'injury in fact' -- an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-561 (footnote, citations and internal quotation marks omitted). The Supreme Court has repeatedly refused to recognize a "generalized grievance" against allegedly illegal governmental conduct as sufficient for standing. United States v. Havs, 515 U.S. 737, 743 (1995). Instead, plaintiffs must show "an injury in fact that is both concrete in nature and particularized to them." In re United States Catholic Conference, 885 F.2d 1020, 1023-24 (2d Cir. 1990). A threat of injury will satisfy the requirement only if "the injury is certainly impending." Babbitt, 442 U.S. at 298. Mere allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of z future harm." Laird v. Tatum 408 U.S. 1, 13-14 (1972). Moreover, it is the plaintiff's burden to "allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." Warth v. Seldin, 422 U.S. 490, 518 (1975).

In this case, plaintiffs do not allege facts sufficient to establish that they have suffered an injury-in-fact in connection with their fifth, sixth, seventh and eighth claims. First, plaintiffs did not brief the issue of standing with respect to their fifth claim, a challenge to the FCC's authority

under § 309(j) to distribute licenses through a competitive bidding process. Apart from the absence of such argument, in the complaint itself, plaintiffs do not allege facts sufficient to show that they have suffered any injury under the challenged provision. Plaintiffs do not contend that they have participated or will participate in any auction, or that an auction of the relevant band for microbroadcasters has ever been scheduled by the FCC. Because plaintiffs have not established a specific injury, they do not have standing to bring this Claim.

Second, plaintiffs' sixth claim fails also for lack of standing. Accepting as true plaintiffs' allegation that Mansbach threatened Steal This Radio with a forfeiture action, that single threat, which has not been repeated or consummated even after plaintiffs recommenced their unlicensed broadcasts, is insufficient to establish an injury that is "certainly impending." Plaintiffs' reliance on Steffel is misplaced. In Steffel, a plaintiff was twice threatened with criminal prosecution if he persisted in passing out handbills at a shopping center. Moreover, that plaintiffs partner in three previous efforts to pass out handbills at the shopping Center had already been arrested and prosecuted. By contrast to the instant case, the plaintiff's exposure in Steffel was to a Criminal statute; enforcement of the statute here would expose plaintiffs only to potential in rem forfeiture. Cf. City of S. Lake Tahoe v. California Tahoe Regal Planning, 625 F.2d 231, 239 (9th Cir. 1980) (distinguishing Steffel on ground that the litigants faced

potential civil action, not criminal prosecution). In addition, there is nothing in the record comparable to the arrest of Steffel's companion to confirm that Mansbach's warning was anything more than an isolated threat.

Finally, it is uncertain that this court could provide the relief requested because the issues raised are not ripe for judicial review. Without the identification of a particularized injury, plaintiffs' claim presents only an abstract constitutional grievance. Such claims lack the specificity and immediacy that shapes vague notions of constitutional principle into "a form historically viewed as capable of judicial resolution." Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 218 (1968) (internal Quotation marks and citation omitted). It is uncontested that no forfeiture proceedings have been brought against Steal This Radio, so there exists no record upon which this court could decide if the forfeiture provisions are unconstitutional "as applied." Cf. Action for Children's Television v. FCC, 827 F. Supp. 4, 14-15 (D.D.C. 1993) (finding that the plaintiffs' facial challenge to the forfeiture statute was not ripe until they received the FCC's final order). This is unquestionably an instance, therefore, in which "postponing review would provide for a more efficient examination and disposition of the issues." Id. at 15 (internal quotation marks and citation omitted). The ripeness doctrine, particularly as it affects standing, see O'Shea v. Littleton, 414 U.S. 488, 494 (1974), is designed primarily to avoid conjecture of the type

that would be necessary to decide the claim that these plaintiffs have brought. At present, the threat of a forfeiture action is too attenuated to provide plaintiffs with a basis for standing.

Plaintiffs argue also that they are closely identified with, and entitled to represent the interests of, other microbroadcasters not parties to this action, whose constitutional rights are violated by the forfeiture provision. (See Pi. Mem. Supp. at 85) Standing to raise constitutional rights of third parties, however, is limited to those circumstances where a plaintiff has suffered injury-in-fact and has a close relation to the third party, and where there exists sore hindrance to that third party's ability to protect his or her own interest. See Powers v. Ohio, 499 U.S. 400, 411 (1991). Plaintiffs have not demonstrated their own injury, let alone shown that other microbroadcasters face any obstacle that hinders their ability to assert their own rights. Accordingly, plaintiffs are precluded from raising the due process claims of other mircrobroadcasters.

As previously noted, to the extent that the seventh and eighth claims pose a facial challenge to FCC regulations and policies, they are properly brought before the FCC first under the doctrine of primary jurisdiction. An alternative interpretation of the two claims, however, is as a challenge to the FCC cease and desist procedures as applied to plaintiffs and other microbroadcasters. Indeed, plaintiffs themselves support this interpretation by claiming that they have suffered injury by

complying with Mansbach's warning, which was "tantamount to the issuance of a cease and desist order" against them. (See Pi. Mem. Supp. at 79)

Under this alternative interpretation, these claims must still be dismissed because plaintiffs do not have standing to challenge the provision as applied to them. Plaintiffs' bald assertion notwithstanding, there is no legal ground on which to equate an official FCC cease and desist order with a single warning to stop broadcasting -- a warning, moreover, that was unaccompanied by an actual threat that a cease and desist order would be forthcoming. Because plaintiffs have suffered no injury-in-fact under the cease and order provisions of the Act, 'hey do not have *standing* to challenge then. Indeed, to decide that Mansbach's warning was an official FCC order would lead also to the dismissal of the claim because, as noted previously, the courts of appeals have exclusive jurisdiction over all FCC final orders.

IV.

Moving to the merits of the case, plaintiffs have raised a variety of constitutional challenges that are difficult to separate. Reading the complaint liberally, it appears that claims three and four assert primarily that the FCC's exercise of its authority is unlawful. Plaintiffs assail the FCC's record as "capricious" (id. at 65), and contend that it has led to an impermissible "monopolization" of expressive activity. (See

Compl. ¶¶ 88, 89) If plaintiffs' contention is that the decisions made, and the regulatory standards established, by the FCC have not furthered the public interest then, again, this court is the wrong forum for their complaint. These challenges are properly brought to the FCC itself and, thereafter, to a court of appeals.

To the extent plaintiffs argue that the public interest standard is overly vague so as to permit the FCC "unbridled discretion" in violation of the non-delegation doctrine, their claims are without merit. The Supreme Court has long since held that Congress properly delegated power to the FCC to decide the composition of radio communication using a standard of public interest. National Broadcasting Corporation v. Columbia Broadcasting Systems, 319 U.S. 190, 227 (1943), the Court affirmed its previous decisions in which it upheld the public interest standard as a constitutional delegation of legislative power. In reaching that determination, the Court explained that

> [i]t is a mistaken assumption that [the standard of public interest] is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary.

Id. at 226 (quoting New York Cent. Sec. Coral. v. United States, 287 U.S. 12, 24-25 (1932) (citing cases)); see also FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940) (finding that the public interest standard was "as concrete as the complicated factors for judgment in such a field of delegated authority

permit"); accord FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 792 (1978) (stating that the FCC has the statutory authority to issue regulations that codify the public-interest licensing standard).

NBC and its progeny notwithstanding, plaintiffs maintain that § 301 is facially invalid because the public interest standard is not content-neutral, and is not narrowly tailored to limit the time, place and manner of protected speech. (see, e.g, Compl. ¶¶ 85, 87, 89, 91) Obligated to distinguish NBC, plaintiffs argue that had the Supreme Court been presented with any First Amendment claims based upon the public forum doctrine the outcome would have been different. (See Pi. Reply at 20) Plaintiffs insist that the "spectrum dedicated to radio broadcasting" is a public forum and that the grant or renewal of licenses conditioned on a public interest standard is inconsistent with the requirement that regulations controlling speech in traditional or designated public fora be definite and objective. (See Pi. Deem. Supp. at 34-67)

The government asserts that public forum analysis is inapplicable because plaintiffs do not seek to use the radio spectrum to engage in protected speech. Citing NBC, the government notes that there is no First Amendment right to broadcast on the radio spectrum without a license. (See Gov't Opp'n at 4, 7) To the extent public forum analysis is applicable, the government contends that the radio spectrum is a nonpublic forum where restrictions on expression are permissible

if they are not for the purpose of suppressing a point of view and otherwise satisfy a requirement of reasonableness. (See id. at 13)

The public forum doctrine is a specialized set of rules limiting the conditions that government may impose on use of its resources, either traditional public fora such as streets, sidewalks, parks, and other "places which by long tradition or by government fiat have been devoted to assembly and debate," Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985) (internal quotation marks and citation omitted), or "designated" public fora, i.e., "property that the State has opened for expressive activity by part or 211 of the public." International Soc'v for Krishna Consciousness Inc. v. Lee, 505 U.S. 672, 678 (1992) (citation gritted). In both traditional and designated fora that are fully open to the public, content-based regulations of speech are subject to the "highest scrutiny," and are permissible only if "narrowly drawn to achieve a compelling [governmental] interest." Id.

Finally, some government property is properly designated as a "nonpublic forum." Id. at 678-79. A limitation On speech in a nonpublic forum may be content-based, see R.A.V. v. City of St. Paul, 505 U.S. 377, 390 n.6 (1992), and "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." Lee, 505 U.S. at 679; see also Paulsen v. County of Nassau, 925 F.2d 65, 69 (2d Cir. 1991) (explaining

that, in a nonpublic forum, "the state has maximum control over communicative behavior since its actions are most analogous to that of a private owner"). Property that does not fall within any of the three categories is not a forum for First Amendment purposes.

Governmental intent is said to be the "touchstone" of forum analysis. Paulsen, 925 F.2d at 69. The government does not create a public forum "by inaction or by permitting limited discourse," Cornelius, 473 U.S. at 802, and when the state reserves property for its "specific official uses," that property remains nonpublic. Capitol Square Review & Advisory Bd. v. dinette, 515 U.S. 753~~ 761 (1995). The Supreme Court has recognized that the government's dedication of property to a commercial enterprise is "inconsistent with an intent to [create] a public forum." Cornelius, 473 U.S. at &04. Likewise, evidence that the government has created a forum to further efficiency and administrative convenience suggests that the forum is nonpublic. See id. at 805. The presence of sore expressive activity in a forum does not, Without more, render it a public forum. See id.

In its opposition to plaintiffs' arguments, the government has improperly compressed the public forum analysis into one step. In essence, it argues that because there is no protected right to broadcast without a license, there is no protected speech at issue in this case and, therefore, public forum analysis is inappropriate. Public forum analysis, however, involves two separate inquiries: (1) whether or not a public

forum exists, and if so, of which type; and (2) whether the challenged limitation on speech is a permitted content-based or time, place and manner limitation within the particular forum. Even if there is no right to broadcast without a license, this proscription is the very limitation plaintiffs are challenging and does not in and of itself preclude public forum analysis.

Nevertheless, there are several Supreme Court cases which do suggest that public forum analysis in this instance is inappropriate because of the unique character of the government licensing regime for broadcasters. For example, in Arkansas Educational Television Commission v. Forbes, 118 S. Ct 1633, 1639 (1998), the Court explained that "public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine" and, indeed, "[c]laims of access under [the Court's] public forum precedents could obstruct the legitimate purposes of . . . broadcasters." In Forbes, the Court did find, as a narrow exception to that general rule, that a public television Broadcast of a political candidate debate was "by design a forum for political speech." Id. Notably, however, the station's position as a broadcast license holder was never considered as an alternative justification for the existence of a public forum. Indeed, given the discussion in Forbes, spectrum frequencies used for licensed broadcasts are not, in general, public fora. See Forbes, 118 S. Ct. at 1639; see also Columbia Broad. Sys.. v. Democratic Nat'l Comm., 412 U.S. 94, 107-09 (1973) (holding that a licensee is neither a common carrier nor a public forum that

must accommodate "the right of every individual to speak, write or publish" (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 1969)); accord National Citizens, 436 U.S. at 800 ("Requiring those who wish to obtain a broadcast license to demonstrate that such would serve the public interest does not restrict the speech of those who are denied licenses." (internal quotation marks and citations omitted)).

Plaintiffs, in essence, concede that frequencies which have been allocated and licensed for radio broadcast are not public fora. (See Pi. Mem. Supp. at 37) They contend, however, that allocated but yet unlicensed radio frequencies are public fora. It is difficult to see how plaintiffs' distinction makes any practical difference. In the parlance of public forum analysis, unallocated spectrum, or spectrum that has been allocated for a particular use but has yet to be distributed to a license holder, is "accessible" to all only in the special sense that it has not been assigned to any particular licensee. Cf. Tire Warner Entertainment Co. L.P. v. FCC, 105 F.3d 723, 727 1997) (Williams, J., dissenting from denial of rehearing in bang with whom Edwards, C.J. and Silberman, Ginsburg and Sentelle, J.J. concur) (explaining that unallocated spectrum is not "government property" and is, therefore, not amenable to public forum analysis).

Assuming, arquendo, that public forum analysis is appropriate, the highly regulated grants of radio broadcast licenses and the exclusive rights of licensees demonstrate that

the radio spectrum is not property that is "generally available," as is a designated public forum, let alone property with "unfettered access," as is a traditional public forum. The licensing and regulation scheme for radio broadcasters demonstrates the government's intent to provide only "selective access, which indicates the property is a nonpublic forum." Forbes, 118 S. Ct. 1633 (internal quotation marks and citation omitted). As the Supreme Court has held, the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, individually, "obtain permission" to use it. See Cornelius, 473 U.S. at 804 (holding that no designated public forum existed when the government reserved eligibility for participation in the Combined Federal Campaign drive to charitable rather than political voluntary agencies, and then made individual, non-ministerial judgments as to Which eligible agencies Would participate); Forbes, 118 S. Ct. at 1643 (holding that, because participation was determined candidate-by-candidate, a debate broadcast was a nonpublic forum). Nor can the government here be said to create a designated forum when it reserves spectrum license eligibility for those applicants who meet technical and financial criteria and then chooses final applications by lottery, auction or comparative hearings.

As noted, in a nonpublic forum the restrictions on expression may not be imposed for the purpose of suppressing a

point of view and must otherwise satisfy a reasonableness standard. In this case, the licensing scheme set forth in the Act satisfies that standard. First, the licensing requirements of the Act are viewpoint neutral. See 47 U.S.C. § 301 (establishing, as a general requirement, that all broadcasters must be licensed); id. § 307 (establishing that the FCC may grant a license if the "public interest, convenience or necessity will be served"); id. § 308 (establishing a nonexhaustive list of criteria the FCC may use in granting licenses, including the applicant's citizenship, expertise, purpose for application and the establishment of financial and technical requirements). Second, the reasonableness of the licensing regime has long been recognized by the Supreme Court, which noted in 1940 that, "[unless Congress had exercised its power . . . to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone." FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940); accord Turner Broad. Sys. v. FCC, 512 U.S. 622, 637 (1994) ("[I]f two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all."); see also Turro v. FCC, 859 F.2d 1498 (D.C. Cir. 1988) (rejecting a First Amendment challenge to an FCC decision refusing to waive its rules prohibiting low-power broadcasts, and finding that decision a reasonable exercise of the FCC's discretion).

::;

Regardless of power level, any radio signal can cause interference on the same or an adjacent channel. Indeed, when reviewing its regulations for low-power broadcasts, the FCC specifically noted that such stations not only interfere with existing high-power stations but may also preclude the development of prospective, more efficient services. See In the Matter of Application for Review of Stephen Paul Dunifer, 11 FCC Rcd. 718, 1995 WL 457843, ¶¶ 14, 18 (F.C.C. Aug. 2, 1995).

In conclusion, public forum analysis does not disturb the relevant findings of NBC: the public interest standard does not violate the non-delegation doctrine but is sufficiently specific to provide the FCC with authority to promulgate regulations that shape and govern radio communication. See NBC, 319 U.S. at 227; National Citizens, 436 U.S. at 793 (restating the principle); United States v. Storer Broad., 351 U.S. 192, 203 (1956) (same). Accordingly, plaintiffs' claims, to the extent they challenge the existing licensing regime, are dismissed.

Finally, in their reply memorandum of law, plaintiffs liberally interpret their complaint to contend that the licensing system fails to provide procedural safeguards against the suppression of First Amendment activity. (See Pl. Reply at 3435) This facial challenge to the statute also is without merit.

Plaintiffs rely on Freedman v. Maryland, 380 U.S. So (1965), in which the Supreme Court established that three procedural safeguards are essential for a licensing scheme to pass constitutional scrutiny: (1) the licensor must decide

whether to issue the license within a specified and reasonable time; (2) prompt judicial review must be available in the event the license is erroneously denied; and (3) the censor must bear the burden of going to court and must bear the burden of proof in court. See id. at 58-60; see also FW/PBS Inc. v. City of Dallas, 493 U.S. 215, 227 (1990) (discussing the Freedman requirements). The third safeguard, however, is necessary only where a licensing scheme acts as a censorship system, see id. at 229-29, the Act does not.

The FCC regulatory scheme sets forth adequate procedures and safeguards for processing license applications and considering Waiver requests, thus fulfilling the first Freedman requirement. See 47 C.F.R. 5 73.3573 (providing procedures for processing FM broadcast applications); WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (deciding that the FCC must consider the waiver request of any applicant who makes a nonfrivolous First Amendment claim). By statute, a denial of an application for a license or request for a waiver is appealable to the Court of Appeals for the District of Columbia, fulfilling the second Freedman requirement. See 47 U.S.C. § 402(b)(1). Moreover, any party slay submit a petition for the issuance, amendment, or repeal of any FCC rule or regulation. See 47 C.F.R. § 1.401(a). A petition for rulemaking is subject to the procedures set forth in 47 C.F.R. Part 1, Subpart C. Any denial of a petition for the issuance, amendment or repeal of a rule or regulation is a final order of the FCC subject to appeal in any

court of appeals. See 47 U.S.C. § 402(a); 28 U.S.C. § 2342. The regulatory framework for licensing microradio stations withstands constitutional review because it specifies procedures which the FCC must follow and it provides for judicial review of any improper FCC ruling.

V.

Because I have dismissed each of plaintiffs' claims for the reasons stated above, plaintiffs' request for a preliminary injunction is moot, and therefore is denied. I turn now to the government's request for injunctive relief.

Section 401(a) of the Act empowers a district court to enjoin violations of the Act. That section provides:

> The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ of mandamus commanding such person to comply with the provisions of this chapter.

47 U.S.C. § 401(a).

The standard for deciding "whether to issue an injunction authorized by a statute of the United States to enforce and implement Congressional policy is a different one

from that of the Court when weighing claims of two private litigants." United States v. Diapulse Corp., 457 F.2d 25, 27 (2d Cir. 1972). The critical question for a district court is whether in view of past violations there is a reasonable likelihood that the wrong will be repeated. See SEC v. Manor

Nursing Ctrs Inc., 458 F.2d 1082, 1100 (2d Cir. 1972). "Where, as here, a statute was enacted to protect the public interest and itself authorizes injunctive relief, "[t]he passage of the statute is, in a sense, an implied finding that violations will harm the public and ought, if necessary, be restrained." Diapulse, 457 F.2d at 28. Accordingly, when seeking an injunction under § 401(a), the government need not demonstrate a likelihood of irreparable harm greater than a likelihood that future violations will occur. See United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (stating that, in the case of a statutory violation, an injunction may be granted if the government establishes there exists "some cognizable danger of recurrent violation"); see also SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975) (securities laws); Diapulse Corp., 457 29 (Federal Food, Drug and Cosmetic Act).

In the case before the court, the requirements for a preliminary injunction are met. Section 301 of the Act prohibits the transmission of communications or signals by radio from within the territorial boundaries of the United States without obtaining a license, or a waiver of the license requirement, from the FCC. Plaintiffs admit not only that they have broadcast in the past without a license (see Compl. ¶¶ 67, 69, 71), but also that they continue to do so. (See id. ¶¶ 80) Moreover, plaintiffs' defenses to the request for an injunction, which are at one with the claims in plaintiffs' complaint, have been dismissed and, therefore, are no hindrance to granting the relief

requested. Given plaintiffs’ three-year-long, nearly continuous violations of the licensing requirement, there is every indication that plaintiffs will continue to violate this provision in the future unless restrained by judicial order. Accordingly, the government's request for a preliminary injunction is granted.